

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. H000779**

**MARIA BOLANOS-HERNANDEZ,  
EMPLOYEE**

**CLAIMANT**

**DILLARDS, INC., SELF-INSURED  
EMPLOYER**

**RESPONDENT**

**GALLAGHER BASSETT SERVICES, INC.,  
INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION AND ORDER FILED NOVEMBER 10, 2021**

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on August 18, 2021, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Steven R. McNeely, McNeely Law Firm, Jacksonville, Pulaski County, Arkansas.

The respondents were represented by the Honorable Rick Behring, Jr., Mayton, Newkirk & Jones, Little Rock, Pulaski County, Arkansas.

**INTRODUCTION**

In the Prehearing Order filed June 11, 2021, the parties agreed to the following stipulations, which they modified and affirmed on the record at the subject hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times, including the specific incident on December 1, 2019, when the claimant alleges she sustained a specific-incident "compensable injury" to her right knee, which she alleges later led to a gradual-onset compensable consequence injury to her left knee.
3. The claimant's average weekly wage (AWW) was \$822.22, which would entitle her to weekly compensation rates of \$548.00 for temporary total disability (TTD), and \$411.00 for permanent partial disability (PPD) benefits, if either or both of her alleged right and left knee injury(ies) is(are) deemed compensable.

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4. The respondents have controverted this claim in its entirety.
5. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Commission Exhibit 1 at 1-2; Hearing Transcript at 4-7). Pursuant to the parties' mutual agreement the issues litigated at the hearing were:

1. Whether the claimant sustained a "compensable injury" to her right knee within the meaning of the Arkansas' Workers' compensation Act (the Act) as the result of a specific incident on December 1, 2019; and whether she sustained a gradual onset compensable consequence injury to her left knee.
2. If either or both of the claimant's alleged injuries are deemed compensable, the extent to which she is entitled to medical and indemnity benefits.
3. Whether the claimant's attorney is entitled to a controverted fee on these facts.
4. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 4-7).

In the prehearing order, the claimant first contends she was working for Dillard's on December 1, 2019, performing work in a squatting position, and that as she stood up she felt a severe tearing pain in her right knee. She contends she is entitled to the payment of her reasonably necessary medical treatment for the alleged right knee injury, including Dr. Eric Gordon's (an orthopedic surgeon associated with OrthoArkansas) surgery to her right knee. The claimant contends that as a result of her alleged right knee specific-incident injury of December 1, 2019, she is entitled to temporary partial disability (TPD) benefits from December 1, 2019, through February 23, 2021; from June 4, 2020, through November 29, 2020; and from January 19, 2021, to a date to be determined, since her salary went from \$17.70/hour to \$14.75/hour as a result of the right knee injury, following her return to work after her right knee surgery in November 2020-3. The claimant further contends she is entitled to TTD benefits from February 24, 2020, through

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June 2, 2020, as she returned to work on June 3, 2020; and from November 30, 2021, to January 18, 2021, as she returned to work on January 19, 2021. Finally, the claimant contends the respondents have controverted both the requested medical and indemnity benefits and, therefore, her attorney is entitled to a controverted fee. (Comms'n Ex. 1 at 2-3; T. at 4-7).

Second, in the prehearing order the claimant contends she sustained a gradual-onset, compensable consequence injury to her left knee as a result of limping because of her alleged right knee injury. She contends she is entitled to medical benefits and indemnity for her left knee. She specifically reserves the issues of her entitlement to additional future medical treatment for the alleged left knee compensable consequence/gradual-onset injury, future TTD benefits; PPD benefits for a future impairment rating, and retraining/vocational rehabilitation. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2-3; T. 4-7).

In the prehearing order the respondents contend they have denied and controverted in its entirety. They contend the claimant did not sustain a compensable injury to either her right or left knee as a result of a specific incident while employed with Dillard's on or about December 1, 2019. The respondents contend the claimant failed to timely report the alleged December 1, 2019, incident, as she provided her first notice of injury to Dillard's on December 10, 2019. The claimant's alleged injuries to her right and/or left knee were not the result of an "accidental injury." The claimant did not sustain a compensable consequence injury to her left knee. The claimant is not entitled to any additional benefits, as the claimant's need for medical treatment, if any, is unrelated to her employment with Dillard's. Instead, the claimant's physical problems and need for treatment, if any, are the result of preexisting and/or degenerative conditions. The respondents contend that if it is determined the claimant is entitled to any benefits, pursuant to *Ark. Code Ann.*

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Section 11-9-411 (2021 Lexis Supplement), the respondents request a dollar-for-dollar set-off for all benefits paid by the claimant's group health carrier, all short-term disability (STD) benefits received by the claimant, all long-term disability (LTD) benefits received by the claimant, and all unemployment benefits received by the claimant. Finally, and alternatively with respect to the claimant's alleged right knee injury, the respondents contend this is a recurrence of an old, prior injury for which the statute of limitations has expired. The respondents reserve all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3-4; T. 4-7).

In her post-hearing brief, the claimant now concedes her left knee injury is not a "compensable injury" within the Act's meaning, and she withdraws her "contention that the left knee [injury] is covered under the Arkansas Workers' Compensation Act." (Claimant's Post-Hearing Brief at 6) (Bracketed material added).

The record consists of the hearing transcript and any and all exhibits contained therein and attached thereto, as well as the parties' blue-backed post-hearing briefs.

### **STATEMENT OF THE CASE**

The claimant, Maria Bolanos-Hernandez (the claimant), was 44 years old at the time of the hearing, and 43 years old at the time of her alleged right knee injury of December 1, 2019. She is a high school graduate who moved from El Salvador to Arkansas in 2006, when she began work as a packer at the Dillard's distribution center. (T. 9-11, 51). Although her primary language is Spanish, she was and is able to communicate with her supervisors in English. (T. 10, 22). The claimant's job as a packer primarily required her to place packing materials into boxes as the boxes came by her on a conveyor belt. (T. 12, 51-52). While performing her job, she stood on a fatigue mat. (T. 51-52).

The claimant testified she had sustained a prior right knee injury while working at Dillard's on April 25, 2017. (T. 13). She testified this injury occurred at Tower 1 as she arose after having squatted down. (T. 13). The claimant admitted the location of her right knee symptoms in April 2017 was the same as those of her alleged December 2019 right knee injury. (T. 24; Respondents' Exhibit 3 at 18). On direct examination, the claimant minimized the severity of her prior right knee condition as a result of and following the 2017 incident, and testified the symptoms from this injury eventually resolved. (T. 13-14). She testified the pain from the 2017 incident did not last long, and eventually resolved. She said she did not want to seek medical treatment following the 2017 incident, but Dillard's required her to do so. (T. 13-14).

In essence the claimant testified she had no serious problems with her right knee before December 1, 2019. (T. 13). Medical records from Concentra following the 2017 right knee incident reveal that radiological findings at that time revealed degenerative changes in the claimant's right knee, although there is no mention of a torn meniscus in relation to the 2017 incident. (Respondents' Exhibit 1 at 9; 7-10).

On cross-examination, the claimant denied her previous deposition testimony of March 15, 2021, wherein she testified under oath she continued to have ongoing pain and swelling as a result of the April 2017 incident. (T. 22-23). In describing her symptoms at the time of the 2017 incident, the claimant admitted there was swelling in her left knee, and she said: "It's kind of like similar to a tearing, but it's just something that does not linger." (T. 23). At the subject hearing the claimant testified she did not have any ongoing problems with her right knee following the 2017 incident. (T. 28). Further cross-examination revealed that, contrary to her hearing testimony, the claimant previously testified under oath at the March 15, 2021, deposition she did in fact have ongoing

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pain/problems with her right knee following the April 2017 incident. (T. 24-30).

At the hearing the claimant testified as follows concerning the April 2017 injury to her right knee:

Q. Did you require any additional treatment after Concentra released you [in 2017].

A. I think so.

Q. Do you remember where you go treatment at after that?

A. They did not give me a treatment, but I felt like I needed a deeper treatment like an MRI, but they never – like, they never did that to me. But I felt like there was still something there in my knee that was never healed up.

Q. What sort of problems were you having – did you continue to have with your knee?

A. I couldn't bend over. I don't know how to -- I couldn't and it scared me, too. It still scares me.

Q. And this was before you had your accident on December 1, 2019?

A. Yes.

Q. When you had problems bending over, did it cause pain?

A. Yes.

Q. Did you have swelling as well?

A. Sometimes.

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Q. But before December 1, 2019, you felt like [] your knee had not healed up; is that correct?

A. Yes, correct.

Q. You felt like you needed an MRI?

A. Yes.

(T. 27-28, 30-31; RX3 at 20-21) (Bracketed material added). The claimant never underwent an MRI after the April 2017 work incident. (T. 31).

In her sworn deposition testimony, the claimant admitted she never reported any ongoing problems with her right knee to Dillard's after the April 2017 incident. (RX3 at 22). At the hearing she testified she was unable to bend down before the December 1, 2019, alleged right knee injury. (T. 28). She further admitted she modified her work activities after the 4/2017 right knee injury to compensate for ongoing problems with her right knee. (T. 32). For example, she said she avoided squatting. (T. 32). In her March 2021 sworn deposition testimony the claimant also denied any prior right knee treatment other than that she underwent immediately following the 4/2017 incident. (RX3 at 57). Contrary to the claimant's testimony in this regard, medical records reveal she reported right knee pain with decreased range of motion (ROM) to a treating physician as early as December 1, 2015, when she had presented herself for examination and treatment to Dr. Martha Rueda at CHI St. Vincent for primary complaints on left knee pain. The medical record in question notes the claimant's decreased ROM in her right knee was due to pain, but goes on to state, "no effusion/erythema/ecchymosis" in her right knee. (T. 33; RX1 at 3).

Concerning the alleged December 1, 2019, incident in which the claimant testified at the hearing she injured her right knee when she squatted down to change paper in a printing machine, and as she stood up she felt severe tearing pain in her right knee. (T. 14-15). The claimant admittedly failed to report this alleged incident, and she continued to work although she described the incident as having caused a severe tearing pain in her right knee. (T. 14-15, 36). She readily admitted she did not slip, trip, or fall, but was injured when she merely bent or squatted down, then

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raised back up. (T. 35-36). The claimant also readily admitted that, although she knew Dillard's policy required her to immediately report a work-related injury to her supervisor, she chose not to do so. (T. 37, 46).

The claimant's supervisor, Mr. Dontae Smith, testified at the hearing and confirmed the claimant failed to report the subject alleged right knee injury. Mr. Smith testified her failure to report the alleged incident was against Dillard's policy regarding the reporting of alleged on-the-job injuries. (T. 47). Mr. Smith testified it was his understanding the claimant's right knee problems initially arose from the prior April 2017 injury, although the claimant denied her right knee problems were the result of the prior injury. (T. 50; RX2 at 4). Mr. Smith also testified that, although he was not familiar with the details of the claimant's medical history, he had observed she was in the habit of changing shoes frequently in the years preceding the alleged 12/1/2019 incident/injury. (T. 50, 54).

Following the alleged 12/1/2019 incident the claimant continued to work at her normal job duties. (T. 37). She testified that following the alleged incident she was physically able to work her shifts, and some of this work required her to lift heavy boxes, which she was able to do. (T. 37, 48; Respondents' Exhibit 2 at 1-2). Again, the claimant testified that while the Dillard's policy required her to immediately report any alleged work-related injury to her supervisor, she did not do so, and she continued to work thereafter without reporting the alleged incident. (T. 37, 46, 48; RX2 at 1-2). The claimant did not present the testimony of any of her co-workers to corroborate her story concerning the alleged incident of December 1, 2019.

On December 5, 2019 – some four (4) days after the alleged 12/1/2019 incident and without notifying anyone at Dillard's – the claimant presented herself to her own physician for evaluation



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and treatment of her right knee. (T. 15; Claimant's Exhibit 1 at 1A-1D). Although at the hearing the claimant testified she told each of her treating physicians the truth (T. 33; RX3 at 43), the medical records reveal she gave an initial history that was different from both her deposition and hearing testimony concerning how the alleged 12/1/2019 right knee injury actually occurred. Specifically, the subject medical records reveal the claimant was "standing upright she had to turn her upper body while taking a step which resulted in a sharp pain in the right knee." (CX1 at 1A). This report contains no mention of the claimant's 4/2017 knee injury, nor does it mention the claimant reported any ongoing, right knee pain and/or swelling from the 2017 incident. (CX1 at 1A-1D).

After having worked several shifts following the alleged 12/1/2019 work incident; failing to report the alleged incident and alleged right knee injury to her supervisor as Dillard's; and having presented herself for treatment to her own personal physician, on December 10, 2019, the claimant finally reported the alleged work-related injury to her supervisor, Mr. Smith. (T. 36-37, 48). Again, the claimant failed to present any witness(es) to corroborate her testimony concerning the alleged 12/1/2019 work incident.

When she finally reported the alleged incident on December 10, 2019, Dillard's sent her to Concentra for examination and treatment of her alleged right knee injury. (RX 2 at 11-14). At this time the claimant provided the following history: "Her knee had been sore for months after remote fall with contusion but tolerable." (RX2 at 12). On December 27, 2019, the claimant reported right knee pain following a second alleged incident in which she twisted her knee. (CX1 at 25). An MRI of 1/14/2020 revealed the claimant had a longitudinal tear of the body of the medial meniscus in her right knee. (CX1 at 38). Similarly, a 2/10/2020 MRI revealed a tear of the medial meniscus of

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the claimant's left knee. (CX1 at 49-50). Having initially contended in the prehearing order and at the subject hearing that her alleged left knee injury was a compensable consequence/gradual onset injury sustained as a result of her altered gait after the 12/1/2019 right knee injury, the claimant concedes in her brief the left knee medial meniscus tear is not work-related. (Claimant's Brief at 6).

On February 24, 2020, the claimant first underwent arthroscopic surgery on her left knee, which she now concedes is not work-related. (CX1 at 58-60; Claimant's Brief at 6). The claimant did not undergo surgery on her right knee until November 3, 2020, almost one (1) year after the date of the alleged 12/1/2019, right knee injury, which she claims is work-related. On this date she underwent an arthroscopy of her right knee with partial meniscectomy, and a patellar chondroplasty. (CX1 at 80-81). The claimant testified she was off work for six (6) weeks, then returned to work at Dillard's. (T. 21). She testified she has not required any additional treatment for her right knee, and that it is much better now. (T. 21; RX3 at 47). The claimant submitted her bills for this surgery (as well as for her left knee arthroscopy) to her employer-provided group health insurer for payment. (RX3 at 8-9).

## **DISCUSSION**

### **The Burden of Proof**

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2021 Lexis Supp.). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). *Ark. Code Ann.* Section 11-

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9-704(c)(3) (2021 Lexis Supp.) states that the ALJ, the Commission, and the courts “shall strictly construe” the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (20201 Lexis Supp.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers’ compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep’t of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission’s exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant’s or any other witness’s testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission’s province to weigh the totality of the medical evidence and to determine what evidence is most

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credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

**The Act's Definition of A "Compensable Injury"**

For the claimant to meet her burden of proof in demonstrating she has sustained a specific-incident "compensable injury" to her right knee within the meaning of the Act, she must prove by a preponderance of the evidence that her injury: (1) arose out of and in course of her employment; (2) caused internal or external harm to his body that required medical services; (3) is supported by objective findings, medical evidence, establishing the alleged injury; and (4) was caused by a specific incident identifiable by time and place of occurrence. *Ark. Code Ann.* § 11-9-102(4) (2021 Lexis Supp.); *Cossey v. Gary A. Thomas Racing Stable*, 2009 Ark. App. 666, at 5, 344 S.W.3d 684, 687 (Ark. App. 2009). The claimant bears the burden of proving her alleged compensable injury by a preponderance of the credible evidence. *Ark. Code Ann.* § 11-9-102(4)(E)(i); and *Cossey, supra*.

In addition, the claimant must prove a causal relationship exists between her employment and the alleged injury. *Wal-Mart Stores, Inc., v. Westbrook*, 77 Ark. App. 167, 171, 72 S.W.3d 889, 892 (Ark. App. 2002) (citing *McMillan v. U.S. Motors*, 59 Ark. App. 85, 90, 953 S.W.2d 907, 909 (Ark. App. 1997)). Objective medical evidence is not essential to establish a causal relationship between the work-related accident and the alleged injury where objective medical evidence exists to prove the existence and extent of the underlying injury, and there exists a preponderance of other nonmedical evidence which establishes a causal relationship between the objective injury and the specific work-related incident in question. *Flynn v. Southwest Catering Co.*, 2010 Ark. App. 766, 379 S.W.3d 670 (Ark. App. 2010).

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It is a black letter principle of workers' compensation law that an employer takes the employee as he finds him; and an employment-related incident that aggravates a preexisting condition(s) is (are) compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (Ark. App. 2003). Stated another way, a preexisting disease or infirmity does *not* disqualify a claim *if* the work-related incident aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which the claimant seeks benefits. *Jim Walter Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (Ark. App. 2003). The aggravation of a preexisting, otherwise non-compensable condition by a compensable injury is itself compensable. *Oliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (Ark. App. 1999). An aggravation is a *new injury* resulting from an independent incident. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (Ark. App. 2000) (Emphasis added). Of course, since it is a new injury resulting from an independent cause, any alleged aggravation of a preexisting condition must meet the Act's definition of a "compensable injury" in order for the claimant to prove compensability. *Farmland Ins. Co. v. Dubois*, 54 Ark. App. 141, 923 S.W.2d 883 (Ark. App. 1996).

Concerning the proof required to demonstrate the aggravation of a preexisting condition, our appellate courts have consistently held that since an aggravation is a *new injury*, a claimant must prove it by *new objective evidence of a new injury different than the preexisting condition*. *Vaughn v. Midland School Dist.*, 2012 Ark. App. 344 (Ark. App. 2012) (citing *Barber v. Pork Grp., Inc.*, 2012 Ark. App. 138 (Ark. App. 2012); *Grothaus v. Vista Health, LLC*, 2011 Ark. App. 130, 382 S.W.3d 1 (Ark. App. 2011); *Mooney v. AT & T*, 2010 Ark. App. 600, 378 S.W.3d 162 (Ark. App. 2010). Where the only objective findings present are consistent with prior objective findings *or consistent with a long-term degenerative condition rather than an acute injury, this does not satisfy*

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*the objective findings requirement for the compensable aggravation of a preexisting condition injury. Vaughn, 2012 Ark. App. 344, at 6 (holding that Arkansas courts have interpreted the Act to require “new objective medical findings to establish a new injury when the claimant seeks benefits for the aggravation of a preexisting condition”); Barber, supra (affirming the Commission’s denial of an aggravation of a preexisting condition claim where the MRI findings revealed a degenerative condition, with no evidence of, and which could not be explained by, an acute injury) (Emphases added.).*

Based on the applicable law as applied to the facts of this case, the preponderance of the credible medical and other evidence of record compels me to find the claimant has failed to meet her burden of proof in demonstrating the degenerative condition of her right knee for which she finally underwent surgery in November 2020 was the result of the alleged 12/1/2019 work incident – *if* this incident even occurred. As is conclusively demonstrated by the operative surgeon’s findings of patellar chondromalacia in his post-surgery report of November 30, 2020 (a patently and well-recognized degenerative condition) in conjunction with a torn medial meniscus was neither aggravated nor accelerated by the alleged work incident, or rather, alleged *incidents*.

First, it must be noted the claimant simply was not a credible witness. I had the opportunity to closely and personally observe the claimant’s demeanor and the way she understood and answered questions on both direct and cross-examination. She gave demonstrably conflicting stories as to when and how she injured her right knee, as well as concerning the severity and residual nature of her right knee symptoms after the undisputed April 2017 work incident, for which she never filed a Form AR-C so that any claim related to this incident would now be barred

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by the applicable statute of limitations. The claimant has alleged she injured her right knee on December 1, 2019, when she squatted down to change the paper in a printing machine and then simply stood up, at which time she felt a severe tearing pain in her right knee. (T. 14-15). When the claimant admittedly failed to report this alleged incident to her supervisor and presented herself for evaluation and treatment to her own personal physician some four (4) days after the alleged 12/1/2019 work incident, she provided a markedly different history when she said, “she was standing upright she had to turn her upper body while taking a step which resulted in a sharp pain in the right knee.” (CX1 at 1A). Thereafter, on December 10, 2019, when she finally did report the alleged 12/1/2019 work incident to Mr. Smith, her Dillard’s supervisor and was sent to Concentra for evaluation and treatment, *the claimant gave yet a third history* concerning the onset of her right knee pain and problems when she reported: “Her knee *had been sore for months after remote fall with contusion* but tolerable.” (RX2 at 12) (Emphasis added). There is no indication this “remote fall and contusion” happened at work.

The claimant clearly told three (3) totally separate and distinct histories, or stories, of an alleged injury to her right knee. From my personal observance of the claimant’s testimony, it is abundantly clear the fact she did so related to her inability to keep her story(ies) straight, and *not* to any difficulty in the claimant’s understanding the question, etc., as there obviously were no language or understanding barriers, etc. So, which one of the claimant’s there (3) separate stories is the Commission to believe? This is especially true when the only evidence that any alleged work incident at all occurred on 12/1/2019 is the claimant’s own uncorroborated, self-serving testimony; and where the medical and other relevant evidence reveals the claimant admittedly had a preexisting, symptomatic right knee condition well before the alleged 12/1/2019 incident.

Second, the claimant's conflicting stories concerning an alleged work incident of 12/1/2019, demonstrate she failed to meet her burden of proving an actual specific incident even occurred on that or any other contemporaneous date. The claimant herself admitted there were no witnesses to the alleged incident. She admitted further she continued to work for at least two (2) more shifts performing her normal duties, which included her even lifting heavy boxes. Although the claimant admitted she had at least two (2) prior reported workers' compensation claims and was well aware of Dillard's policy concerning immediately reporting work-related injuries, she admittedly did not report any such injury to her right knee until almost two (2) weeks later, when she finally reported the alleged incident to her supervisor on December 10, 2019.

Third, the medical records reveal the claimant's left knee condition apparently took precedence over her right knee condition. An MRI of 1/14/2020 of the claimant's right knee revealed degenerative changes and a torn meniscus. Likewise, an MRI of 2/10/2020 revealed degenerative changes and a torn medial meniscus in her left knee. Torn menisci are often associated with degenerative changes in the knees. Apparently, the claimant's treating orthopedic surgeon was more concerned with the condition of the claimant's left knee, as he performed surgery on it first, on 2/24/2020. The claimant's orthopedic surgeon did not operate on her right knee until almost one (1) year after the alleged 12/1/2019 work incident – again, to which there were no/zero (0) corroborating witnesses – and for which the claimant gave three (3) conflicting histories of how the alleged injury occurred.

When the claimant finally did undergo surgery on her right knee on November 3, 2020, her surgeon's operative report of the same date revealed the tell-tale signs of two (2) well-recognized degenerative conditions in the claimant's right knee: chondromalacia of her patella (kneecap), and



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a torn medial meniscus. The claimant has conceded the fact she cannot meet her burden of proof in demonstrating her left knee condition is work-related, and she has withdrawn her claim related to her left knee. This fact – especially when considered in light of the claimant’s conflicting injury histories, her failure to report the alleged 12/1/2019 right knee injury until almost two (2) weeks after it allegedly occurred, while continuing her work duties without apparent difficulty or complaint – provide strong evidence the claimant herself knows her right knee condition does not meet the Act’s definition of a “compensable injury”, either.

Fourth, while the aggravation of a preexisting condition constitutes a “compensable injury” within the Act’s meaning here, as in *Vaughan and Mooney, supra*, although the claimant offered contradictory testimony concerning the extent of the symptoms relating to her right knee preexisting condition, she did admit the existence of a *symptomatic, preexisting condition in her right knee*. See also, *Jacob A. Henrichson v. West Tree Service, Inc.*, AWCC No. H006313 (Full Commission Opinion Filed August 16, 2021). While the claimant appears to have attempted to downplay both the residual nature as well as the severity of her preexisting right knee condition before the alleged 12/2019 incident, this condition was significant enough to make her cautious about bending or stooping down at the knees. It also concerned her enough for her to alter her day-to-day work activities.

Moreover, the claimant readily admitted both her prior right and left knee pain and problems, although it appears she did in fact attempt to downplay their significance and severity. Still, she was undoubtedly symptomatic in both her right and left knees prior to the alleged 12/1/2019 work incident – *if* this uncorroborated incident even occurred. *If* the subject incident occurred, surely it would have been easy for the claimant to have a co-worker testify at the hearing and corroborate

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and perhaps even clarify her own contradictory, self-serving testimony. Who is to say if the alleged 12/1/2019 work incident even occurred based on the readily apparent inconsistencies in the claimant's medical history. The entirety of the testimony and medical evidence support a finding the claimant's condition was degenerative in nature, and was neither caused nor aggravated by any alleged specific incident on 12/1/2019 – again, *if* such an incident even occurred.

Fifth, and finally, even if I were to find the claimant's right knee condition was a recurrence of her admitted April 2017 work injury, this would not constitute a new "compensable injury", but rather would merely be another period of incapacitation resulting from the April 2017 injury. *See, Crudup v. Regal Ware, Inc., supra.* Such a recurrence exists when the current symptoms are a natural and probable consequence of the initial injury. *Id.* Here, the claimant herself admitted (and the relevant medical records *do corroborate* her testimony in this regard) she sustained a right knee injury in April 2017. Although she tried to deny, or at the very least downplay the significance this injury at the hearing, she testified in her deposition that after completing treatment in 2017 she had never completely healed, and she believed she required additional evaluation and treatment back in 2017, including an MRI, which she never underwent or requested.

Although she never filed a Form AR-C for the 2017 right knee injury, nor did she pursue additional treatment in 2017, the claimant admitted her 2017 and alleged 2019 injuries involved the same area of her right knee. And again, although she tried to deny and/or downplay the significance of the April 2017 right knee injury at the subject hearing, the claimant testified in her deposition she suffered from ongoing pain and swelling following the April 2017 incident that was significant enough to concern and "scare her" enough to cause her to alter the manner in which

*Maria Bolanos Hernandez, AWCC No. H000779*

she performed her day-to-day work activities thereafter.

Therefore, for all the aforementioned reasons, I hereby make the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations contained in the Prehearing Order filed June 11, 2021, which the parties modified and affirmed on the record at the hearing, hereby are accepted as facts.
2. The claimant has failed to meet her burden of proof in demonstrating the alleged December 1, 2019, incident/right knee injury even occurred, much less that it constitutes a “compensable injury” within the Act’s meaning.
3. The clamant concedes her alleged gradual onset/compensable consequence left knee injury is not work-related, and she has withdrawn her contentions with respect to this alleged left knee injury. Her concession hereby is accepted as a finding of fact and conclusion of law herein.
4. The claimant’s attorney is not entitled to a fee on these facts.

Wherefore, for all the aforementioned reasons, I find this claim should be, and hereby is, denied and dismissed.

**IT IS SO ORDERED.**

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Mike Pickens  
Administrative Law Judge

MP/mp